

Kong Siew Ken v Law Ah Lan & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D2-24-220 OF 1992
 ABDUL AZIZ J
 18 JANUARY 2002

Bankruptcy — Capacity of bankrupt — Competency to manage company — Undischarged bankrupt prohibited from acting as director of company — Injunction to restrain further participation in company, whether should be allowed — Companies Act 1965 s 125(1)

Bankruptcy — Capacity of bankrupt — Transfers of shares — Bankrupt transferred shares to intermediary and wife — Transfer made prior to plaintiff becoming member of company — Whether plaintiff had locus standi to render transfer void

The second defendant was adjudged a bankrupt in 1998. After becoming a bankrupt, he continued to represent himself in the company correspondence as chairman or director and took part in the management of the company and was even appointed general manager. The second defendant's shares in the company was transferred to one Ho Kum Chen at 10 sen per share before being subsequently transferred to the second defendant's wife, namely, the first defendant. The plaintiff prayed to the court for an injunction to restrain the second defendant from continuing to take part in the management of the company and that the transfer to Ho Kum Chen, and subsequently to the first defendant was void because it did not comply with art 34A of the company's articles of association.

Held, allowing the application for injunction, dismissing the other prayers:

- (1) Section 125(1) of the Companies Act 1965 prohibited an undischarged bankrupt from acting as director of a company or taking part directly or indirectly in the management of a company except with leave of court. There was therefore a basis for granting the application for injunction unless the second defendant was now no longer a bankrupt (see p 298D–E).
- (2) The plaintiff could not rely on the ground that the transfer to Ho Kum Chen, and therefore the transfer to the first defendant, was void because it did not comply with art 34A of the company's articles of association because that was not the ground relied upon in his affidavit in support of his originating summons. The ground relied in the affidavit was about the contravention of bankruptcy law. Furthermore, the plaintiff only became a member of the company after the transfers to Ho Kum Chen and the first defendant. There was, therefore, at the time of the transfers, no obligation on the part of the second defendant or anyone else to the plaintiff to observe the provisions of art 34A, and the plaintiff therefore had no locus standi to make the present application on that ground (see pp 298H–299B).

A [Bahasa Malaysia summary]

Defendan kedua telah dihukum bankrap pada tahun 1998. Setelah menjadi bankrap, beliau masih mengenalkan diri dalam perhubungan syarikat sebagai pengerusi atau pengarah dan mengambil bahagian dalam pengurusan syarikat dan juga dilantik sebagai pengurus besar. Saham-saham defendan kedua dalam syarikat tersebut telah dipindahkan kepada Ho Kum Chen pada 10 sen satu saham sebelum dipindahkan kemudiannya kepada isteri defendan kedua, iaitu, defendan pertama. Plaintiff memohon kepada mahkamah untuk satu injuksi bagi menyekat defendan kedua daripada terus mengambil bahagian dalam pengurusan syarikat dan bahawa pemindahan kepada Ho Kum Chen, dan kemudiannya kepada defendan pertama adalah batal kerana ia tidak mematuhi perkara 34A perkara-perkara persatuan.

Diputuskan, membenarkan permohonan untuk injuksi, menolak permohonan-permohonan lain:

- D** (1) Seksyen 125(1) Akta Syarikat 1965 menghalang seorang bankrap yang belum dibebaskan daripada bertindak sebagai pengarah sebuah syarikat atau mengambil bahagian secara langsung dan tidak langsung dalam pengurusan sebuah syarikat kecuali dengan kebenaran mahkamah. Oleh itu terdapat asas untuk membenarkan permohonan untuk injuksi kecuali jika defendan kedua bukan lagi seorang bankrap (lihat ms 298D–E).
- E** (2) Plaintiff tidak boleh bergantung atas alasan bahawa pemindahan kepada Ho Kum Chen, dan oleh demikian pemindahan kepada defendan pertama, adalah batal kerana ia tidak mematuhi perkara 34A perkara-perkara syarikat kerana ia bukan alasan yang beliau bergantung kepada dalam affidavit sokongan dalam saman pemula beliau. Alasan yang beliau bergantung kepada dalam affidavit tersebut adalah tentang pelanggaran undang-undang kebangkrutan. Tambahan pula, plaintiff hanya menjadi ahli syarikat selepas pemindahan-pemindahan kepada Ho Kum Chen dan defendan pertama. Oleh itu, terdapat, pada masa pemindahan-pemindahan tersebut, tiada obligasi di pihak defendan kedua atau sesiapaapun kepada plaintiff untuk meneliti peruntukan perkara 34A, dan plaintiff oleh itu tiada locus standi untuk membuat permohonan sekarang ini berdasar alasan tersebut (lihat ms 298H–299B).]
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Notes

For cases on capacity of a bankrupt, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1598–1611.

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Cases referred to

Abu Bakar bin Jaafar & Anor v Malayan Banking Bhd [1991] 1 CLJ 492 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 47(1), 52(1), 53B, 54(1)(c)
 Companies Act 1965 s 125(1)
 Rules of the High Court 1980 O 15 r 16

Loy Chee Say (Nahappan, Dorairaj & Danker) for the plaintiff.
Saran Singh (Saran Singh & Co) for the defendants.

Abdul Aziz J: I shall dispose of prayer 4 first, which is for an injunction to restrain the second defendant from representing himself as a director or the chairman of the third defendant company or 'menjaga urusan dan urusaniaga' of the company.

The prayer is against the second defendant. He became a bankrupt on 20 June 1988. At the hearing of this originating summons, he was represented by counsel for the official assignee in whom his estate was vested. The official assignee did not oppose the prayer. There has been no dispute that after he became a bankrupt, the second defendant did represent himself in correspondence as chairman or director and continued to take part in the management of the company. In fact, on 10 June 1988, ten days before he became a bankrupt, he was appointed general manager, and after that he continued to act in that office.

Section 125(1) of the Companies Act 1965 prohibits an undischarged bankrupt from acting as director of a company or taking part directly or indirectly in the management of a company except with leave of court. There is therefore a basis for granting prayer 4 unless the second defendant is now no longer a bankrupt.

As to the other prayers, the facts briefly are as follows.

On 8 June 1988, the second defendant informed the company that he wished to transfer his entire shareholding of 366,501 shares in the company, to one Ho Kum Chen at 10 sen per share, and that he had received the price of RM36,650. On 9 June 1980, the company approved the transfer.

A few days later, on 20 June 1988, the second defendant was adjudged a bankrupt.

On 28 February 1989, after the second defendant became a bankrupt, Ho Kum Chen wrote to the company saying that he wished to transfer the 366,501 shares to the first defendant, who is the second defendant's wife, at the same price, and that he had received the price of RM36,650. On the same date, the company approved the transfer.

In submission, learned counsel for the plaintiff said that the ground for all the other prayers is that the transfer to Ho Kum Chen, and therefore that to the first defendant as well, was void because it did not comply with art 34A of the company's articles of association, which article was intended to ensure that shares to be sold were first offered to an existing shareholder.

In my opinion, the plaintiff cannot rely on this ground because that is not the ground relied upon in his affidavit in support of his originating summons. The ground relied on there is in contravention of bankruptcy law. Furthermore, it would appear from exh KSK-2 to the plaintiff's said

- A affidavit and exh PP-2 to the affidavit of Pang Seng Nyong dated 19 October 1992, that the plaintiff only became a member of the company after the transfers to Ho Kum Chen and the first defendant. There was, therefore, at the time of the transfers, no obligation on the part of the second defendant or anyone else to the plaintiff to observe the provisions of art 34A, and the plaintiff therefore had no locus standi to make the present application on that ground. As sought on that ground, therefore, I refuse those prayers.

- C As to contravention of the bankruptcy law, which is the ground that is relied on in the plaintiff's said affidavit, his counsel said in submission that it was only for prayer 1, which seeks a declaration that the transfer of the shares by the second defendant for the benefit of the first defendant is void. The declaration will affect the first defendant's interests.

- D My understanding of the submission of learned counsel for the plaintiff as regards this ground is as follows. The transfer to Ho Kum Chen, although it was done before the bankruptcy of the second defendant, was void because by virtue of s 47(1) of the Bankruptcy Act 1967 ('the Act'), as explained as to its effect in *Abu Bakar bin Jaafar & Anor v Malayan Banking Bhd* [1991] 1 CLJ 492, the shares had vested in the official assignee at the time of the act of bankruptcy. It is not in evidence on what date the act of bankruptcy was, but it must have been assumed that it must have been before the transfer, which was only a matter of 12 or 11 days before the receiving order was made. The transfer to Ho Kum Chen was therefore void because the second defendant had no power to transfer the shares or had no property in the shares to transfer. It followed that the subsequent transfer by Ho Kum Chen to the first defendant was also void.

- F According to s 54(1)(c) of the Act, the transfer to Ho Kum Chen would not have been void if it had been for 'valuable consideration', which sub-s (2)(a) defines as 'a consideration of fair and reasonable money value in relation to the value of the property ... transferred', but the shares were transferred at 10 sen per share, whereas the plaintiff has produced the evidence of a firm of chartered accountants, which has not been disputed, that the shares could have been sold at 40 to 60 sen per share.

- G Learned counsel for the plaintiff submitted that the two transfers constituted in effect a voluntary settlement under s 52(1) of the Act, which is absolutely void against the official assignee.

- H Although it was not referred to in submission, I should mention that I notice in the court file two affidavits by Ho Kum Chen dated 2 and 27 October 1992 (encll (7a) and (16)) in which he confesses that at the time of the transfer to him he was given to understand that the shares were to be transferred to the second defendant's representative later, that he did not pay or receive any payment for the shares and that the second defendant told him that the matter had to be carried through urgently because the bankruptcy hearing was coming soon.

- I The only argument raised by learned counsel for the first defendant against this ground that merits consideration is that the plaintiff has no locus standi to seek the declaration in prayer 1 on this ground because the plaintiff

has no interest in the shares and would not benefit from the declaration. The person who has an interest and would benefit is the official assignee, and only he would have the locus standi to seek such a declaration. Counsel relied on s 52(1) of the Act, meaning, I presume, to argue that if it was a voluntary settlement, the section says that it is void against the official assignee, and therefore it is the official assignee alone who should seek redress. Counsel also relied, presumably for the same argument, on s 53B of the Act which provides that the property of a bankrupt acquired by a person under a transaction that is void shall be deemed to be the property of the official assignee and which empowers the official assignee to recover it.

Learned counsel for the plaintiff did not argue against that submission although in his submission previous to that of the first defendant's counsel, while he had conceded that the plaintiff was not entitled to the benefit of the declaration sought and that only the official assignee would be so entitled, he had maintained that the plaintiff was entitled to seek the declaration by reason of O 15 r 16 of the Rules of the High Court 1980, which says:

No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

I do not think that the rule is intended to resolve any problems of locus standi. It only has the effect of recognizing a form of proceeding as good and acceptable, but does not deal with the question of who would have the locus standi to bring such a proceeding in a particular case. I think reliance on the rule to answer an objection as to locus standi is misconceived.

Perhaps the argument as to locus standi has not been as thorough as may be desired, but as the argument has gone, I am inclined to favour that of the learned counsel for the second defendant that only the official assignee has locus standi to seek prayer 1.

The result is that the plaintiff is entitled to prayer 4 if the second defendant is still a bankrupt. I dismiss the other prayers with costs for the first defendant.

Prayer 4 allowed, other prayers dismissed with costs.

Reported by Wong Ee Lynn

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